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No. 02-1848

In The

Supreme Court of the United States

FRANKLIN P. KOTTSCHADE,

Petitioner,

v.

CITY OF ROCHESTER,

Respondent.

On Petition for Writ Of Certiorari To
The U.S. Court of Appeals for the Eighth Circuit

BRIEF AMICI CURIAE OF
The American Forest and Paper Association (AFPA); Building Industry Legal Defense Foundation of Southern California (BILDFSC); California Building Industry Association (CBIA); International Council of Shopping Centers (ICSC); National Association of Industrial and Office Properties (NAIOP); National Association of Realtors (NAR); Real Estate Roundtable (RER); Rochester (Minnesota) Area Builders (RAB) In Support of Petitioner

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INTERESTS OF THE AMICI CURIAE[1]

The parties have filed written consent with the Clerk of the Court allowing the amici listed herein to submit this brief in support of the Petitioner.

The *amici* are a coalition of trade associations whose membership shares a common interest in the protection of private property rights safeguarded by the Takings Claus of the Fifth Amendment. Accordingly, the *amici* are concerned with any judicial decision that calls into question the "just compensation" remedy available under the U.S. Constitution to its members. In this case, their interest is heightened by the basic, fundamental, jurisdictional issue at play: When their members suffer an uncompensated taking as a result of government actions, can they ever vindicate those types of federal constitutional claims in a federal court?

The American Forest & Paper Association (AF&PA) is the national trade association of the forest, pulp, paper, paperboard, and wood products industry. It represents approximately 125 member companies which grow, harvest and process wood and wood fiber; manufacture pulp, paper and paperboard products from both virgin and recovered fiber; and produce solid wood products. The AF&PA is also the umbrella for more than 60 affiliate member associations that reach out to more than 10,000 companies.

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[1] Pursuant to Rule 37.6 of the Rules of the Court, the undersigned Counsel of Record certifies that he authored this Brief in its entirety; that it was not written in whole or in part by counsel for a party; and that no one, other than the amici curiae, has made a monetary contribution to its preparation or submission.

AF&PA represents an industry that owns the majority of commercial timberland in the United States, amounting to over 50 million acres. Activity on this land is often subject to government regulation.

The Building Industry Legal Defense Foundation ("BILD") is a non-profit corporation, organized and existing under the laws of the state of California. BILD represents and advocates on behalf of more than 1700 BIA/SC member companies ("Members") in eight chapters in Southern California, including landowners, developers, home builders, building industry subcontractors, utility providers, and business entities of all kinds. Members own land subject to regulatory bodies with jurisdiction throughout the region. The BILD Foundation's mission is to defend the legal rights of home and property owners. BILD seeks to participate in regulatory, judicial and other venues wherever critical legal and policy matters affecting its members are at issue.

The California Building Industry Association ("CBIA") is a non-profit mutual benefit trade association organized under the laws of the State of California. CBIA represents over 6,000 member companies who employ more than 500,000 people in the State of California. CBIA's members are responsible for the construction of more than 70% of all new homes built in the State of California annually. Its members are involved in all aspects of the planning and building and construction industry, including working with local authorities in the planning stages. Its mission includes maintaining a stable right to private property.

The missions of the International Council of Shopping Centers ("ICSC") are to advance the shopping center industry and to promote its role in the commercial

distribution of consumer goods and services. Its members have a strong interest in protecting private property rights and in advocating the interests of the shopping center industry before federal, state, and local governmental bodies, as well as in the courts.

The National Association of Industrial and Office Properties ("NAIOP") is the nation's leading organization of developers, investors, and owners of commercial real estate. NAIOP provides support and guidance to its over 11,000 members nationally to create, protect, and enhance the value of commercial and industrial real estate, as well as promote grassroots public policy related to real estate development.

The National Association of Realtors ("NAR") is a non-profit association representing persons engaged nationwide in all phases of the real estate business, including, but not limited to, brokerage, appraising, management, and counseling. NAR was created to promote and encourage the highest and best use of the land, to protect and promote private ownership of real property, and to promote professional competence. Its members contribute to such activities as promotion of equal opportunity in housing, real estate licensing, neighborhood revitalization, safeguarding real property rights, public service, and cultural diversity.

The Real Estate Roundtable ("RER") is the organization that brings together leaders of the nation's top public and privately-held real estate ownership, development, lending and management firms with the leaders of major national real estate trade associations to jointly address key national policy issues relating to real estate and the overall economy. Collectively, RER members hold portfolios containing over 3.5 billion square feet of developed property valued at more than $300 billion. The RER has

long advocated that the implementation of local, state and federal laws be more sensitive to the constitutional property rights of private citizens, and that adequate remedies be available when those rights are violated.

The Rochester (Minnesota) Area Builders ("RAB") is a professional organization established in 1953 consisting of businesses involved in the construction industry. As the leader in the greater Rochester area construction industry, its goal is to benefit its members in the professional growth of their businesses and to support their legal rights through participation, advocacy, education, and community involvement. RAB also serves as a resource for its community by providing education about quality building practices.

SUMMARY OF ARGUMENT

This case is about court access and procedural fairness. The Court is not asked to decide whether Frank Kottschade must be compensated for the taking that is alleged, but simply whether that issue is ripe for resolution in federal court.

The Court of Appeals, relying upon *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 195 (1985), affirmed the District Court's dismissal of Mr. Kottschade's takings claim on the ground that it was not ripe for decision in a federal court until he had "unsuccessfully attempted to obtain just compensation through the procedures provided by the state for obtaining such compensation." *Kottschade v. City of*

Rochester, 319 F.3d 1038, at 1040 (8th Cir. 2003).[2] In so doing, it declined to address the conflict between *Williamson* and the Court's decision in *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997). The nature of that conflict is aptly stated in the Petition (Questions Presented, Question 1). On the one hand, under *Williamson* as interpreted by the Court of Appeals and other federal courts, landowners seeking compensation for regulatory takings must first sue in state court, but if they do and are not successful, their attempts to return to a federal court to validate their federal claims are frustrated by doctrines of issue and claim preclusion. On the other hand, *City of Chicago* affords municipal defendants in regulatory takings cases the discretion and absolute right to remove them to federal court, even though such a right is limited only to cases where the plaintiff could have filed suit in federal court in the first place (28 U.S.C. § 1441(a)).

Of course, as the lower courts have ruled herein, landowners such as Mr. Kottschade are not permitted to sue in federal court. Further, as stated in Question 1 of the

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[2] In an unpublished Opinion found in the Appendix to the Petition at page App. 9, The District Court described the "threshold issue" as whether Plaintiff "must first seek compensation through state procedures," and ruled that in a regulatory takings case "the State's action is not 'complete' in the sense of causing a constitutional injury 'unless or until the State fails to provide an adequate post-deprivation remedy for the property loss'." *Id.* at App. 11, (D.Minn. 2002), citing *Williamson*, 473 U.S. at 195. The District Court concluded that until Kottschade seeks relief "in a *state court* inverse condemnation action" and relief is thereafter denied, the claim of taking without just compensation is not ripe for a decision by a federal court and, accordingly, it lacked jurisdiction herein. *Id.* at App. 17 (emphasis added).

Petition, the combination of *Williamson* and *City of Chicago* gives municipal defendants "a veto power" over a landowner's 7th Amendment right to a jury trial. *See, City of Monterey v. Del Monte Dunes, Ltd.*, 526 U.S. 687 (1999). The Court of Appeals, reflecting the concerns of other federal appellate courts, acknowledges that Mr. Kottschade's arguments are "justly" stated; that the combination of the state remedies exhaustion requirement and the barriers to federal jurisdiction thereafter facing compliant landowners "may be anomalous;" but concludes that whether and how the problem should be addressed, "is for the Supreme Court to say, not us." *Kottschade*, at 1041. With respect, the Court should accept this invitation.

Nothing in *Williamson* warrants the conclusion that *only state courts* can be utilized as the forum for determining whether an adequate post-deprivation remedy for a property loss exists under state law. Federal courts routinely become involved in reviewing actions of local governments in other constitutional contexts, and the treatment of Fifth Amendment takings claims should be no different. When local land use decisions are challenged on takings grounds, no basis exists to exclude federal courts from determining whether compensation has been paid, or examining whether "state procedures" for obtaining compensation from local governments are adequate or have been exhausted.

In light of *City of Chicago*, takings plaintiffs must be able to pursue their claims in federal court without first pursuing state court litigation. *Williamson*'s ripeness requirement cannot be reconciled with the laws of issue and claim preclusion. Thus, it is imperative that certiorari be granted.

Zoning bodies and lower courts across the country have abused or misapplied the Supreme Court's decision in

Williamson by fabricating additional obstacles before a court can assess the merits of a takings claim – causing concrete deprivations of property rights. As a result, recent research (discussed *post* at page 16) shows that over 80% of takings claims have been denied or dismissed by U.S. District Courts on ripeness or abstention grounds. Nearly two-thirds of those cases which were appealed to federal appellate courts were dismissed on jurisdictional grounds. Clearly, the Court could not have intended that the doors of the federal courthouse are slammed shut only on plaintiffs alleging a taking under the Fifth Amendment, while (1) municipal defendants in such cases retain the option of litigating in either federal or state court, *City of Chicago*, and (2) plaintiffs with other constitutional claims are allowed reasonable access to the federal courts.

ARGUMENT

I. FEDERAL COURTS SHOULD REVIEW TAKINGS CLAIMS ARISING FROM LOCAL LAND USE MATTERS JUST AS THEY ROUTINELY REVIEW CONSTITUTIONAL CHALLENGES INVOLVING OTHER ACTIONS OF LOCAL GOVERNMENTS.

The "right of access to the courts" has been described by this Court as a "fundamental right guaranteed by the Constitution." *Village of Belle Terre v. Boraas*, 416 U.S. 1, 7 (1974). Surely, this cannot mean that for citizens asserting Fifth Amendment takings claims, this fundamental right extends only to review by state courts. Yet that is exactly what has happened in the wake of *Williamson* and its progeny in lower federal courts. Federal judges routinely cite *Williamson's* ripeness requirements in rejecting takings claims. This is due primarily to the fact that they interpret *Williamson's* second prong – requiring

utilization of "state procedures" to obtain just compensation – as requiring landowners to litigate their takings claims in state courts first. Nothing in *Williamson* warrants such an interpretation.

Federal judges should review constitutional challenges to local government actions in the land use area, just as they review local government infringements upon other privileges in the Bill of Rights. The exercise of constitutional rights often hinges on traditionally local issues. Yet, these highly insular concerns present no barriers to federal court jurisdiction, except in the Fifth Amendment context.

On October 14, 1997, Professor Daniel R. Mandelker of Washington University of St. Louis, one of the leading academics in the country on land use regulation (and an advocate of the strong use of regulatory power), wrote a letter to the Chairman of the Judiciary Committee of the U.S. Senate, regarding this very problem.[3] He cited numerous examples of the extensive involvement of federal courts in state and local constitutional issues, contrasting them to the peremptory treatment often given to takings claims. Beginning with cases involving encroachments by local governments upon constitutional guarantees of freedom of speech and religion, including decisions of the Court, he noted that nothing in the First Amendment arena

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[3] *See* letter from Professor Mandelker to Senator Orin G. Hatch, Chairman of the Senate Judiciary Committee, dated October 14, 1997, on file with Counsel for the *Amici*. Professor Mandelker also testified before committees of the House and Senate on these issues (hereinafter "Mandelker Testimony"). The Mandelker Testimony has been reprinted in 31 THE URB. LAW. 234 (Spring 1999).

requires a plaintiff to first litigate such "provincial matters" in state court "before the doors of the federal courthouse are unlocked."[4] Of course, federal court involvement in state and local constitutional issues is by no means limited to First Amendment cases. In emphasizing this point, Professor Mandelker stated in part:

> "In the land use venue, federal judges have shown no hesitation to embroil themselves in household issues such as "family values." For example, in a celebrated zoning case the Supreme Court stated that "[a] quiet place where yards are wide, people are few, and motor vehicles restricted are legitimate guidelines in a land use project addressed to family needs....It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." *Village of Belle Terrev. Boraas*, 416 U.S. 1, 9 (1974) . In *Belle Terre*, the Second Circuit "start[ed] by examin[ing]" the subject zoning ordinance's validity with reference to "the interest of the local community in the protection and maintenance of the prevailing traditional family pattern...." 476 F.2d 806, 815 (2d Cir. 1973) (emphasis supplied). The federal courts also considered the constitutionality of zoning as applied to non-traditional families in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) (invalidating Texas city's denial of special use permit for the operation of a group home for the mentally retarded). In these cases, highly parochial matters

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[4] October 14, 1997 letter from Professor Mandelker to Senator Orin G. Hatch, Chairman, Senate Judiciary Committee.

were resolved on the merits by federal courts because important constitutional rights were at stake. The same result should obtain in the Fifth Amendment context. Citizens should not be frozen out of federal court when municipalities infringe upon constitutionally-protected property rights."

"Like land use, education is traditionally considered an area of local and state concern. Yet the federal courts have a long history of assessing the constitutionality of state or local statutes or policies dealing with education. See, e.g., *Wallace v. Jaffree*, 472 U.S. 38 (1985) (Alabama law requiring period of silence in public schools "for meditation or voluntary prayer"); *School District of the City of Grand Rapids v. Ball*, 473 U.S. 373 (1985) (school district's program providing public instructional services for religious education to non-public school students) (overruled on other grounds, *Agostini v. Felton*, 521 U.S. 203 (1997); *Abington School Dist. v. Schemp*, 374 U.S. 203 (1963) (Pennsylvania statute providing for Bible reading in public school). The point is that initial state court consideration of state education statutes is not a prerequisite to federal court jurisdiction. Applications of municipal land use laws in a manner that raises Fifth Amendment issues should not be treated any differently."

"Similarly, the federal courts have not hesitated to address property issues to determine the Fourth Amendment's scope. For example, "the curtilage concept [that] originated at common law to extend to the area immediately surrounding a dwelling house ... plays a part in determining the reach of the Fourth Amendment"—and is freely decided by federal

> courts in the first instance. *United States v. Dunn*, 480 U.S. 294, 300 (1987) (barn located 60 yards from home, not enclosed by a fence, was not within curtilage and thus not protected by Fourth Amendment). Indeed, federal judges have preoccupied themselves with whether garbage, sitting at the curb outside one's home and to be picked up by local trash collectors, warrants Fourth Amendment protection.[5] In none of these cases was state court litigation over the breadth of the Fourth Amendment a necessary precondition to federal adjudication on the merits. These cases bring to mind Justice Brennan's recognition that "if a policeman must know the Constitution, then why not a planner?" *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 661 n. 26 (1981) (Brennan J., dissenting)."[6]

In light of the long involvement of federal courts in constitutional issues arising across a wide spectrum of purely local matters, no valid basis exists for discriminating against citizens whose property rights under the Fifth Amendment may have been violated by local land use actions. If these citizens may only access state courts to

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[5] *See, e.g., United States v. Dela Espriella,* 781 F.2d 1432 (9th Cir. 1986); *United States v. O'Bryant,* 775 F.2d 1528 (11th Cir. 1985); *United States v. Michaels,* 726 F.2d 1307 (8th Cir.), *cert. denied,* 469 U.S. 820 (1984); *United States v. Kramer,* 711 F.2d 789 (7th Cir.), *cert. denied,* 464 U.S. 962 (1983); *United States v. Terry,* 702 F.2d 299 (2d Cir. 1983), *cert. denied sub nom. Williams v. United States,* 461 U.S. 931 (1983); *United States v. Crowell,* 586 F.2d 1020 (4th Cir. 1978, *cert. denied,* 440 U.S. 959 (1979); *Magda v. Benson,* 536 F.2d 111 (6th Cir. 1976); *United States v. Mustone,* 469 F.2d 970 (1st Cir. 1972).

[6] October 14, 1997, letter from Professor Mandelker to Senator Orin G. Hatch, Chairman, Senate Judiciary Committee.

validate their claims, the Takings Clause has indeed become a "poor relation" to other protections afforded in the Bill of Rights.[7] Professor Mandelker correctly concluded that the "state exhaustion requirement" should be removed "from the ripeness landscape," because requiring a plaintiff to seek compensation in State court:

> "effectively drain[s] the ripeness rules of any meaning. They prevent federal courts from ever reaching the final decision issue because, under this view, a takings plaintiff must seek compensation in state court until that court clearly says it will not entertain a compensation remedy.[8]

II. IN LIGHT OF THIS COURT'S DECISION IN *CITY OF CHICAGO V. INTERNATIONAL COLLEGE OF SURGEONS*, TAKINGS PLAINTIFFS MUST BE ABLE TO PURSUE THEIR CLAIMS IN FEDERAL COURT WITHOUT FIRST PURSUING STATE COURT LITIGATION.

The interplay of *Williamson* and *City of Chicago,* as interpreted by the lower courts herein and other federal courts,[9] has elevated *Williamson* to a weapon of mass obstruction against takings claimaints. The amici support the Petitioner's argument that a ludicrous situation now exists, a "Catch 22" where, as a practical matter, a plaintiff

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[7] *See Dolan v. City of Tigard*, 512 U.S. 374, 393 (1994).

[8] Mandelker Testimony, 31 THE URB. LAW. 234, at 251 (Spring, 1999).

[9] *See, e.g., Dodd v. Hood River County*, 136 F.3d 1219 (9th Cir. 1998) *cert denied*, 525 U.S. 923 (1998); *Wilkinson v. Pitkin County Bd. of Comm'rs*, 142 F.3d 1319 (10th Cir. 1998).

in a takings case may proceed only in state court, while the local government retains the option of defending in either state or federal court. As the *Wilkinson* court noted in applying preclusion doctrines to bar a takings claim,

> *Williamson's* ripeness requirement may, in actuality, almost always result in preclusion of federal claims . . . . It is difficult to reconcile the ripeness requirement of *Williamson* with the laws of [issue and claim preclusion].[10]

Indeed, this was a problem that Professor Mandelker envisioned in 1997:

> [E]ven if the property owner strictly adheres to *Williamson County*, her failure to raise a *federal* constitutional claim in *state* court could destroy her chances of ever having a federal judge address the Fifth Amendment claim. I do not think that property owners should be forced to litigate federal takings claims in State court, yet this is the ironic effect of the synergy between ripeness and res judicata.[11]

Unfortunately, that is precisely what has occurred in cases since Professor Mandelker submitted his testimony. Mr. Kottschade filed his valid takings claims in federal court precisely because if he is forced to litigate them in state court, he will never reach the U.S. District Court on the merits of his case. The federal judge would simply invoke claim or issue preclusion and thus bar federal adjudication. The Court of Appeals below, echoing the concerns of the *Wilkinson* court, acknowledges this "anomalous" reality,

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[10] *Wilkinson*, 142 F.2d at 1325, n.4.
[11] Mandelker Testimony, 31 THE URB. LAW. 234, at 251.

but expressly leaves it to this Court to resolve it.[12] The amici respectfully request the Court to do so.

III. ZONING BODIES AND LOWER FEDERAL COURTS ACROSS THE COUNTRY HAVE ABUSED WILLIAMSON TO FABRICATE ADDITIONAL HURDLES BEFORE A FEDERAL COURT CAN ASSESS THE MERITS OF A TAKINGS CLAIM.

Although not directly germane to the issue raised by this appeal, the hostility of federal courts to landowners' takings claims deserves comment. [13] This hostility has conveyed a message that local land use decisions are immune from constitutional review.[14] It has encouraged agencies to

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[12] *Kottschade v. City of Rochester*, 319 F.3d at 1041.

[13] Since *Williamson*, this hostility has become more pervasive, and indeed has bordered on elitist at times. For example, even though constitutional property rights issues were at stake, one appellate court proclaimed that "federal courts are not boards of zoning appeals." *River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 165 (7th Cir. 1994). Another, in dismissing a takings claim, was concerned that it be perceived as "the Grand Mufti of local zoning boards." *Hoehne v. County of San Benito*, 870 F.2d 529, 532 (9th Cir. 1989). Yet another characterized the takings claim before it as merely "a garden variety zoning dispute dressed up in the trappings of constitutional law." *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 467 (7th Cir. 1988).

[14] This is contrary to prior Supreme Court rulings that local governments are not immune from liability in 42 U.S.C. Section 1983 actions, such as the instant case. *See, e.g., Owen v. City of Independence*, 445 U.S. 622 (1980). In *City of Monterey v. Del Monte Dunes, Ltd.*, 526 U.S. 687, 707 (1999), the Court rejected this notion: "To the extent the city argues that, as a matter of law, its land-use decisions are immune from judicial scrutiny

manipulate the development review process. Intimidated applicants are ping-ponged from agency to agency or between agencies and courts in an often futile quest for those two illusory quarks, a "final" decision that is "ripe" for judicial review.[15]

Thus, it is not surprising that a recent survey of reported federal takings cases between 1990 and 1998 indicates that 83 percent of takings cases with an opinion reported by a U.S. District Court were dismissed on ripeness or abstention grounds. Of those landowners who could afford to bring an appeal, 64 percent still faced dismissal on jurisdictional grounds. On the average, the minority of property owners who received a determination that their takings claims could be adjudicated on the merits endured 9.6 years – almost a decade – of negotiation and litigation, just to get to this point.[16]

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under all circumstances, its position is contrary to settled regulatory takings principles. We reject this claim …."

[15] The federal courts' avoidance of takings claims is a common subject of analysis. See *e.g.*, Gregory Overstreet, *The Ripeness Doctrine of the Takings Clause: A Survey of Decisions Showing Just How Far Federal Courts Will Go to Avoid Adjudicating Land Use Cases,* 10 J. LAND USE & ENVT'L L. 91 (1994); Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights,* 29 CAL. WESTERN L. REV. 1 (1992); Brian Blaesser, *Closing the Federal Courthouse Door on Property Owners,* 2 HOFSTRA PROP. L.J. 73 (1988).

[16] *See* J. Delaney and D. Desiderio, *Who Will Clean Up The 'Ripeness Mess'? A Call For Reform So Takings Plaintiffs Can Enter The Federal Courthouse.* 31 THE URB. LAW. 195, 203-204 (Spring, 1999). The survey actually understates the full extent of the problem in that it includes a number of special situations in which suit was legally required to be filed in federal court, including three cases involving the Tahoe Regional Planning

In his famous "plurality dissent" in *San Diego Gas and Electric Company v. City of San Diego*, 450 U.S. 621 (1981),[17] the late Justice William Brennan quoted the words of a municipal attorney to illustrate the regulatory abuses that can follow when finality and ripeness are misused by agencies to game the system:[18]

> At the 1974 annual conference of the National Institute of Municipal Law Officers in California, a California City Attorney gave fellow city attorneys the following advice:
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> "IF ALL ELSE FAILS, MERELY AMEND THE REGULATION AND START OVER AGAIN. If legal maintenance does not work, and you still receive a claim attacking the land use regulation, or if you try the case and lose, don't worry about it. All is not lost. One of the extra 'goodies' contained in the

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Agency (which under the operable compact can only be sued in federal court), the City of Chicago case which was removed by the City to federal court, the Resolution Trust case involving a federal defendant, and several others. An earlier survey by Gregory Overstreet indicated that over 90% of takings claimants are turned away at the courthouse door. *See* Note 15.

[17] In *San Diego Gas,* a plurality of the Supreme Court, agreeing with Justice Brennan, agreed for the first time since *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922) that an overreaching police power regulation could effect a taking requiring compensation. This was later confirmed in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987).

[18] *See* also Rodney L. Cobb, *Land Use Law: Marred by Public Agency Abuse*, 3 Wash. U. J. L. & Pol'y 195 (2000). Mr. Cobb was, for many years, Staff Counsel for the American Planning Association and was also Editor of LAND USE LAW AND ZONING DIGEST.

> recent [California] Supreme Court case of *Selby v. City of San Buena Ventura*, 10 Cal.3d 110, appears to allow the City to change the regulation in question, even after trial and judgment, make it more reasonable, more restrictive, or whatever, and everybody starts over again .... See how easy it is to be a City Attorney. Sometimes you can lose the battle and still win the war. Good luck." Longtin, *Avoiding and Defending Constitutional Attacks on Land Use Regulations* (Including Inverse Condemnation), in 38B NIMLO MUNICIPAL LAW REVIEW 192-193 (1975) *San Diego Gas and Electric Company v. City of San Diego*, 450 U.S. 621, 655, n.22 (1981) (Brennan, J. Dissenting) (emphasis in original).

Abuses of the ripeness doctrine and its misapplication in the wake of *Williamson* have been noted by other eminent authorities. For example, an *Amicus Curiae* brief submitted to the Supreme Court by the American Planning Association ("APA") on behalf of a defendant planning agency in a takings case candidly recognized that current ripeness rules

> "invite[ ] local government to create a more complicated and time consuming review and approval process. It is, in fact, an open invitation for some local governments to do mischief. Unscrupulous officials can and often do easily assert, after the fact, that they "would have been willing" to consider an intensity of use or an alternative type of use that the landowner never proposed. This is plainly unfair and an abuse of [the ripeness requirement] Brief *Amicus Curiae* of the American Planning Association in support of Respondent,

Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725 (1997).[19]

Professor Daniel R. Mandelker, in testifying on September 23, 1997, before the House Judiciary Committee, Subcommittee on Courts and Intellectual Property, expressed his view of ripeness requirements with respect to the Takings Clause as follows:

> It is my opinion that, based on the nature of the takings clause, property owners must first pursue some negotiation with land use officials to determine how far a regulation goes. However, I do not believe that ripeness barriers should be arbitrary, insurmountable or labyrinthine."[20]

City of Monterey v. Del Monte Dunes, Ltd., 526 U.S. 687 (1999) exemplifies the kind of labyrinthine case that Professor Mandelker was talking about. The developer submitted 19 different site plans and numerous applications over a period of years in a futile effort to obtain approval.[21] Each submission was designed to meet successively lower density levels recommended by the planning board.

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[19] Mandelker Testimony, 31 THE URB. LAW. 234, at 237 (Spring, 1999). Professor Mandelker was *Of Counsel* on the APA Brief. When the APA learned that portions of its *Amicus Brief* to the U.S. Supreme Court in *Suitum* would be cited by Professor Mandelker, in his testimony to Congressional Committees, APA President Eric Damian Kelly wrote to the Honorable Henry C. Hyde, Chair of the House Judiciary Committee, on September 16, 1997, to "repudiate" these portions of its brief. See Note 3.

[20] Mandelker Testimony, 31 THE URB. LAW. 234, at 239 (Spring, 1999). *See* Note 3.

[21] *See* J. Delaney and D. Desiderio, *Who will Clean Up the Ripeness Mess*, at 16.

Ultimately, the City refused to allow any development and a jury awarded compensation for a taking. Nine years had elapsed from submission of the first plan to a lower court's decision that the claim was ripe, without ever reaching the merits. Eight more years of litigation on the merits followed before the Supreme Court reviewed the case. While the property owners in *City of Monterey* ultimately prevailed, the land use labyrinth they were forced to navigate is by no means unique.[22]

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[22] *Id.* at 7-21. *See*, for example, the following cases involving multiple submissions of development plans, and lengthy agency reviews (often taking many years) culminating in dismissal of court challenges on ripeness grounds. *Id.* at 7-21: *Forseth v. Village of Sussex,* 20 F.Supp.2d 1267, 1272 (E.D. Wisc. 1998), *aff'd in part, rev'd in part,* 199 F.3d 363, 366 (7th Cir. 2000); *Good v. United States,* 39 Fed. Cl. 81, 101-103 (1997), *aff'd,* 189 F.3d 1355 (1999), *cert. denied,* 529 U.S. 1053 (2000); *2BD Ltd. P'ship v. County Comm'rs for Queen Anne's County,* 896 F.Supp. 518 (D.Md. 1995), *aff'd following remand,* 162 F.3d 1158 (4th Cir. 1998); *Schulze v. Milne,* 849 F.Supp. 708, 709 (N.D.Cal. 1994), *aff'd in part, rev'd in part on other grounds,* 98 F.3d 1346 (9th Cir. 1996); *Southview Assocs. v. Bongartz,* 980 F.2d 84, 92 (2d Cir. 1992), *cert. denied,* 507 U.S. 987 (1993); *Kaiser Development Co. v. City and County of Honolulu,* 649 F.Supp. 926, 940, 941 n. 19, 942 n. 21 (D. Hawaii 1986), *aff'd,* 898 F.2d 112 (9th Cir. 1990), *cert. denied,* 499 U.S. 947 (1991). State courts often emulate federal courts regarding finality and ripeness. A California state case typifies the situation that landowners can confront when seeking development approvals from state and local official, *e.g.*, *Healing v. California Coastal Comm'n*, 22 Cal. App. 4th 1158 (Ct. App. 1994).

CONCLUSION

For the foregoing reasons, the Petition For Writ of Certiorari should be granted.

Respectfully submitted,

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